



California Fair Political Practices Commission

September 11, 1989

Daniel J. McHugh, Esq.
Best, Best & Krieger
400 Mission Square
3750 University Avenue
Riverside, CA 92502

Re: Your Request for Informal Assistance
Our File No. I-89-443

Dear Mr. McHugh:

You have requested written advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Since you have not identified the public official by name who is requesting the advice, we are treating your request as one for informal assistance in your capacity as counsel to the city in question. (Regulation 18329(c)(1).)²

QUESTIONS

1. May the councilmember meet with city staff to discuss the processing of development projects in which the councilmember is involved?

2. May the councilmember take action to approve, conditionally approve, or disapprove a parcel map, tentative map or other entitlement for which the councilmember was retained to prepare plans or provide services?

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

CONCLUSIONS

1. The councilmember may not contact city staff to discuss the processing of development projects, because sources of income to him are directly involved in the decision. He may respond to questions from city staff about the processing or evaluation of drawings or submissions of an architectural, engineering or similar nature.

2. The councilmember may not take action to approve, conditionally approve, or disapprove a parcel map, tentative map or other entitlement, because sources of income to him are directly involved in the decision.

FACTS

Your firm is counsel to 14 cities in and around the Riverside-San Bernardino County areas. You have been asked by a councilmember of one of your city clients to request written advice with respect to certain economic interests of that councilmember.

According to the facts that you have provided, the councilmember owns a business which performs engineering and surveying services for builders and developers. You question whether the conflict-of-interest provisions of the Act will permit the councilmember or his family to meet with the city manager or with city building, engineering and planning staff to discuss the processing of development projects in which the councilmember is involved. You would also like some advice as to whether the councilmember may take action to approve, conditionally approve, or disapprove a parcel map, tentative map, or other development entitlement for which the councilmember was retained by the applicant to prepare plans, perform surveying services, or other related tasks.

ANALYSIS

Section 87100 prohibits public officials from making, participating in, or using their official position to influence any governmental decision in which they know or have reason to know they have a financial interest. Whether a public official has a financial interest in a decision is governed by Section 87103, which provides, in part:

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the

official or a member of his or her immediate family or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

* * *

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

* * *

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

Section 87103.

Members of city councils are public officials subject to the conflict-of-interest provisions of the Act. (Section 82048; Regulation 18700, copy enclosed.) Therefore, the councilmember may not participate in or use his official position to influence any governmental decision which will have a foreseeable material effect on his financial interest, including any source of income to him.

You have indicated that the councilmember owns his business. For the purpose of this analysis, we assume that his investment is worth \$1,000 or more. The councilmember must not participate in or use his official position to influence any governmental decision which will have a material effect on this business investment.

For the purpose of this analysis, we will further assume that his ownership interest is ten percent or greater. As an owner of at least 10 percent, income to the business will be attributed to the councilmember on a pro-rata basis. (Section 82030; Corbett Advice Letter, No. A-86-081, copy enclosed.) Thus, if the councilmember owns 10 percent of the business, a source of gross income to the business of \$2,500 in one year is considered a

source of income of \$250 to the councilmember. Therefore, the councilmember must disqualify himself from any decision which will foreseeably and materially affect persons or business entities that have been a source of income to him of \$250 or more in the preceding 12 months.

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however, certainty is not required. (Downey Cares v. Downey Development Com. (1987) 196 Cal.App.3d 983, 989-991; Witt v. Morrow (1977) 70 Cal.App.3d 817, 822; In re Thorner (1975) 1 FPPC Ops. 198 (copy enclosed).) The Act seeks to prevent more than actual conflicts of interest; it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

Although the information that you have supplied is very general in nature, it seems clear that decisions made regarding the various projects before the city would have a financial effect on those projects.

Material Financial Effect

The effect of a decision is material if any person (including a business entity) which has been a source of income to an official of \$250 or more in the preceding 12 months is directly involved in a decision before the official's agency. (Regulation 18702.1(a), copy enclosed.) Whether a person or business entity is directly involved in a decision is determined as follows:

(b) A person or business entity is directly involved in a decision before an official's agency when that person or entity, either personally or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency.

(3) A person or business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity.

According to the facts that you have provided, any decisions to be made involve proceedings in which the developers who are sources of income to the councilmember are directly involved.³ The decisions relate to pending applications for projects and would involve entitlements. Therefore, the councilmember may not make or participate in those decisions or use his official position to influence them.

1. Making or participating in a decision

Regulation 18700 sets forth criteria for determining whether an official is making or participating in a decision. It states in pertinent part:

(b) A public official "makes a governmental decision," except as provided in subsection (d) of this section, when he or she, acting within the authority of his or her office:

(1) Votes on a matter;

(2) Appoints a person;

(3) Obligates or commits his or her agency to any course of action;

(4) Enters into any contractual agreement on behalf of his or her agency;

(5) Determines not to act, within the meaning of sub-paragraphs (1), (2), (3) or (4), unless such determination is made because of his or her financial interest. When the determination not to act occurs because of his or her financial interest, the official's determination must be accompanied by disclosure of the financial interest, made part of the agency's official record or made in writing to the official's supervisor, appointing power or any other person specified in a conflict of interest code adopted pursuant to Government Code Section 87300.

(c) A public official or designated employee "participates in the making of a governmental deci-

³ There are additional tests to determine materiality which apply when a business entity is only indirectly involved in the decision. (Regulation 18702.2, copy enclosed.) However, we need not discuss these tests here in view of the applicability of the stricter standard for direct involvement.

sion" when, acting within the authority of his or her position, he or she:

(1) Negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; or

(2) Advises or makes recommendations to the decision-maker, either directly or without significant intervening substantive review, by:

(A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or

(B) Preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision.

Regulation 18700(b) and (c).

This means that the councilmember may not take action to approve, conditionally approve, or disapprove a parcel map, tentative map, or other development entitlement for which he was retained to prepare plans, perform surveying services or other related tasks.

2. Using official position to influence a decision

Regulation 18700.1 defines when an official is using his or her position to influence a governmental decision. It states, in pertinent part:

(a) With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her agency, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.

Regulation 18700.1(a), copy enclosed.

This means that the councilmember may not meet with the city manager or with members of the building, engineering or planning staff of the city to discuss the processing of the development projects. Any contact with city staff must be limited to necessary contact concerning the processing or evaluation of drawings or submissions of an architectural, engineering or similar nature. (Regulation 18700.1(b)(4).) "Necessary contact" is limited to responding to questions from city staff about the processing or evaluation of his drawings or submissions. (West Advice Letter, No. A-88-413, copy enclosed.)

Sanctions

Any person who violates the conflict-of-interest provisions of the Act is subject to a variety of sanctions. As a general rule, the Commission's policy is to proceed administratively. The maximum administrative penalty for violating the Act is \$2,000 per violation. (Section 83116.)

There are also civil and criminal penalties pursuant to Sections 91000-91015. For example, violation of any provision of the Act is subject to prosecution for a misdemeanor and to a criminal fine of up to the greater of \$10,000 or three times the amount received by the official in violation of the Act.⁴ (Section 91000.) Any official who realizes an economic benefit as a result of a violation of Section 87100 is liable in a civil action brought by the civil prosecutor or by a person residing in the jurisdiction for any amount up to three times the value of the benefit. (Section 91005.)

Sanctions for violation of the conflict-of-interest provisions of the Act do not include removal from office. However, any person who is convicted of a misdemeanor under the Act is prohibited from being a candidate for any elective office or from acting as a lobbyist for a period of four years following the date of the conviction unless the court at the time of sentencing specifically determines that this provision shall not apply. (Section 91002.) This would include candidates, incumbents, or any other person who violates the Act.

⁴ Provisions of Proposition 68, passed by the voters in 1988, remove the requirement of proving a violation of the Act was committed "knowingly and willfully." The validity of this provision is the subject of litigation. Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission, Case No. B039177, Court of Appeal, Second Appellate District, Division 3.

Our File No. I-89-443
Page 8

If you have any further questions regarding this matter
please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel

A handwritten signature in cursive script, appearing to read "Margaret W. Ellison".

By: Margaret W. Ellison
Counsel, Legal Division

KED/MWE/aa

Enclosures



California Fair Political Practices Commission

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ANALYSIS

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official or a member of his or her immediate family or on:

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For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

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Sanctions for violation of the conflict-of-interest provisions of the Act do not include removal from office. However, any person who is convicted of a misdemeanor under the Act is prohibited from being a candidate for any elective office or from acting as a lobbyist for a period of four years following the date of the conviction unless the court at the time of sentencing specifically determines that this provision shall not apply. (Section 91002.) This would include candidates, incumbents, or any other person who violates the Act.

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Our File No. I-89-443
Page 8

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please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel

A handwritten signature in cursive script, appearing to read "Margaret W. Ellison".

By: Margaret W. Ellison
Counsel, Legal Division

KED/MWE/aa

Enclosures

BEST, BEST & KRIEGER

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

LAWYERS

ARTHUR L. LITTLEWORTH*
GLEN E. STEPHENS*
WILLIAM R. DEWOLFE*
BARTON C. GAUT*
CHARLES D. FIELD*
PAUL T. SELZER*
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CHRISTOPHER CARPENTER*
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CARL F. HERBOLD
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JOHN R. ROTTSCHAEFER
MARTIN A. MUELLER
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JEFFERY J. CRANDALL
SCOTT C. SMITH
LANCE A. ADAIR
JACK B. CLARKE
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TERESA J. PRISTOJKOVIC
VICTORIA N. KING
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MATT H. MORRIS
JEFFREY V. DUNN
JAMES E. NEUERBURG
STEVEN C. DEBAUN
BRANT H. DVEIRIN
ERIC L. GARNER
DENNIS M. COTA

RAYMOND BEST (1868-1957)
JAMES H. KRIEGER (1913-1975)
EUGENE BEST (1893-1981)

* A PROFESSIONAL CORPORATION

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JAMES B. CORISON, OF COUNSEL
RICHARD A. OSHINS, OF COUNSEL
ADMITTED IN NEW YORK, NEVADA,
WASHINGTON, D.C. COURT OF CLAIMS

OFFICES IN
PALM SPRINGS (619) 325-7264
RANCHO MIRAGE (619) 568-2611
ONTARIO (714) 989-8584
SAN DIEGO (619) 457-4915

July 24, 1989

Legal Division
California Fair Political
Practices Commission
428 J Street, Suite 800
Sacramento, California 95814

Re: Request for Written Advice

Ladies and Gentlemen:

We are counsel to 14 cities in and around the Riverside-San Bernardino County areas and have been asked by a councilmember of one of our city clients to request your written advice with respect to certain economic interests of that councilmember.

The concerned councilmember owns a business which performs engineering and surveying services for builders and developers. Our principal inquiry in behalf of the councilmember centers on the question of whether or not the councilmember, or members of the councilmember's family, may meet with the City Manager, Building, Engineering and Planning staff of the city for which he is a councilmember, and discuss the processing of proposed conditions for, or other similar issues associated with the councilmember's development projects. Further, the councilmember

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LAW OFFICES OF
BEST.BEST & KRIEGER

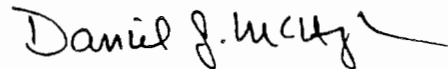
Legal Division
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Page Two

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If you require any additional information with respect to the above, please do not hesitate to contact me. Given the importance of the issue to the councilmember, we would appreciate it if you could render a written opinion to me at the address noted herein below at your earliest convenience.

Daniel J. McHugh, Esq.
Best, Best & Krieger
400 Mission Square
3750 University Avenue
Riverside, California 92502

Very truly yours,



Daniel J. McHugh
for Best, Best & Krieger

DJM/ph



California Fair Political Practices Commission

July 28, 1989

Daniel J. McHugh
Best, Best & Krieger
P.O. Box 1028
Riverside, CA 92502

Re: Letter No. 89-443

Dear Mr. McHugh:

Your letter requesting advice under the Political Reform Act was received on July 26, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Margaret Ellison an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Kathryn E. Donovan
Kathryn E. Donovan
General Counsel

KED:plh

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July 24, 1989

Legal Division
California Fair Political
Practices Commission
428 J Street, Suite 800
Sacramento, California 95814

Re: Request for Written Advice

Ladies and Gentlemen:

We are counsel to 14 cities in and around the Riverside-San Bernardino County areas and have been asked by a councilmember of one of our city clients to request your written advice with respect to certain economic interests of that councilmember.

The concerned councilmember owns a business which performs engineering and surveying services for builders and developers. Our principal inquiry in behalf of the councilmember centers on the question of whether or not the councilmember, or members of the councilmember's family, may meet with the City Manager, Building, Engineering and Planning staff of the city for which he is a councilmember, and discuss the processing of proposed conditions for, or other similar issues associated with the councilmember's development projects. Further, the councilmember

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LAW OFFICES OF
BEST, BEST & KRIEGER

Legal Division
California Fair Political Practices Commission
July 24, 1989
Page Two

has requested we seek your advice on whether the councilmember may take action to approve, conditionally approve, or disapprove a parcel map, tentative map, or other development entitlement for which the councilmember was retained by the applicant to prepare plans, perform surveying services, or other related tasks.

If you require any additional information with respect to the above, please do not hesitate to contact me. Given the importance of the issue to the councilmember, we would appreciate it if you could render a written opinion to me at the address noted herein below at your earliest convenience.

Daniel J. McHugh, Esq.
Best, Best & Krieger
400 Mission Square
3750 University Avenue
Riverside, California 92502

Very truly yours,

A handwritten signature in dark ink, appearing to read "Daniel J. McHugh", with a stylized flourish extending to the right.

Daniel J. McHugh
for Best, Best & Krieger

DJM/ph



California Fair Political Practices Commission

July 28, 1989

Daniel J. McHugh
Best, Best & Krieger
P.O. Box 1028
Riverside, CA 92502

Re: Letter No. 89-443


Dear Mr. McHugh:

Your letter requesting advice under the Political Reform Act was received on July 26, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Margaret Ellison an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,


Kathryn E. Donovan
General Counsel

KED:plh